

1 MCGREGOR W. SCOTT
United States Attorney
2 JUSTIN J. GILIO
Assistant United States Attorney
3 2500 Tulare Street, Suite 4401
Fresno, CA 93721
4 Telephone: (559) 497-4000
Facsimile: (559) 497-4099
5

6 Attorneys for Plaintiff
United States of America
7

8
9 IN THE UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
12
Plaintiff,
13
v.
14 PEDRO DURAN,
15
Defendant.
16

CASE NO. 1:20-CR-00096-NONE-SKO

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER

DATE: March 3, 2021
TIME: 1:00 p.m.
COURT: Hon. Sheila K. Oberto

17 This case is set for a status conference on March 3, 2021. This Court has issued a series of
18 General Orders to address public health concerns related to COVID-19 and to suspend jury trials in the
19 Eastern District of California. By stipulation, the parties now move to continue the status conference to
20 June 2, 2021, and to exclude time between March 3, 2021 and June 2, 2021.

21 Although the General Orders address the district-wide health concern, the Supreme Court has
22 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
23 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
24 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
25 exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
26 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
27 judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally
28 or in writing").

Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory and inexcusable—General Orders 611, 612, and 617 require specific supplementation. Ends-of-justice continuances are excludable only if “the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or other emergencies, this Court has discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

In light of the societal context created by the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4).¹ If continued, this Court should designate a new date for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant’s counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for status on March 3, 2021.

¹ The parties note that General Order 612 acknowledges that a district judge may make “additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D. Cal. March 18, 2020).

1 2. By this stipulation, defendant now moves to continue the status conference until June 2,
2 2021, and to exclude time between March 3, 2021, and June 2, 2021, under Local Code T4.

3 3. The parties agree and stipulate, and request that the Court find the following:

4 a) The government has represented that discovery associated with this case includes
5 investigative reports, numerous photographs and videos, hundreds of hours of recorded
6 telephone conversations pursuant to wiretap order, cellular phone extractions, and large amounts
7 of cellular telephone precise location data. This discovery has been either produced directly to
8 counsel and/or made available for inspection and copying. Additionally, the government
9 anticipates providing a small amount of supplemental discovery over the coming weeks.

10 b) Counsel for defendant desires additional time consult with their clients, conduct
11 further investigation, review the voluminous discovery, prepare for a possible trial, and to
12 continue to explore a potential resolution of the case.

13 c) Counsel for defendant believes that failure to grant the above-requested
14 continuance would deny him/her the reasonable time necessary for effective preparation, taking
15 into account the exercise of due diligence.

16 d) The government does not object to the continuance.

17 e) Based on the above-stated findings, the ends of justice served by continuing the
18 case as requested outweigh the interest of the public and the defendant in a trial within the
19 original date prescribed by the Speedy Trial Act.

20 f) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
21 et seq., within which trial must commence, the time period of March 3, 2021 to June 2, 2021,
22 inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(ii), (iv) [Local Code
23 T4] because it results from a continuance granted by the Court at defendant's request on the basis
24 of the Court's finding that the ends of justice served by taking such action outweigh the best
25 interest of the public and the defendant in a speedy trial.

26 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
27 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
28 must commence.

1 IT IS SO STIPULATED.

2
3
4 Dated: February 17, 2021

McGREGOR W. SCOTT
United States Attorney

5
6 /s/ JUSTIN J. GILIO
JUSTIN J. GILIO
Assistant United States Attorney

7
8
9 Dated: February 17, 2021

/s/ Anthony P. Capozzi
Anthony P. Capozzi
Counsel for Defendant
Pedro Duran

10
11
12 **FINDINGS AND ORDER**

13
14 IT IS SO ORDERED.

15 Dated: **February 18, 2021**

/s/ *Sheila K. Oberto*
UNITED STATES MAGISTRATE JUDGE